1, 1982

No. 27 of 1981

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

ANTHONY FULTON REID — Appellant

- and -

SUSAN ROSEMARY REID — Respondent

CASE FOR THE RESPONDENT

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1. This is an Appeal (and, subject to the granting of Special Leave,) a Cross-Appeal. The Appeal is brought by leave of the Court of Appeal of New Zealand. The Appellant appeals first from the judgment of the Court of Appeal of New Zealand (Woodhouse Cooke and Richardson, J.J.) delivered 22nd August 1979 which allowed the Respondent's Appeal from the Order of Quillam, J. made 21st November 1977. The judgment of the Court of Appeal of New Zealand provided that:- Vol 1 P 93-5 Vol 1 P 100

(1) Current values were to be fixed for all matrimonial property unless the parties agreed otherwise with consequential orders,

(2) The matrimonial home and the family chattels were to be divided equally,

(3) The balance of the matrimonial property in the hands of either party and as defined in the judgment of the Court was to be shared as to 60% to the Appellant and 40% to the Respondent (Cooke J. dissenting as to the proportions) and

(4) Vesting orders made in the Supreme Court were to stand.

2. The Respondent seeks to cross-appeal by virtue of a grant of special leave as a result

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of an application to be made on the hearing of the appeal to the effect that the balance of the matrimonial property (in the hands of either party and as defined in the judgment of the Court of Appeal) should have been divided 50/50 between the parties. This case is respectfully drafted on the basis that leave to cross-appeal is granted, and on the further basis that the precise extent of the Appellant's cross-appeal is not clear from his petition, especially with regard to the issues arising in respect of valuations referred to in Paragraph 3 below.

1979 INZLR 572 (in pocket at end)

3. In addition, the Appellant appeals against the judgment of the Court of Appeal of New Zealand given 21st November 1980 adjudging the amount the Respondent was to recover from the Appellant being:-

Vol 1 P147 & (1980) 2 NZLR 270

(a) $180,668.96 (the money equivalent of the Respondent's share of the matrimonial property after allowance for what she already held and as adjusted by the Court of Appeal)

(b) $601.48 (valuation fees)

(c) $2,243.90 (costs) and

(d) $16,890.97 (interest)

It is not clear whether the Appellant seeks to attack all or any of the valuations upon which the judgment was based and if he does the grounds for so doing. The Respondent only seeks to cross-appeal the judgment of 21st November 1980 insofar as it is necessary to adjust it to give effect to the 50/50 division referred to in Paragraph 2 above.

4. The questions for decision involve the construction and application of the New Zealand Matrimonial Property Act, 1976 (No. 166 of 1976) (hereinafter "The Act"). The Act has since been amended by the Matrimonial Property Amendment Act 1980 (No. 74 of 1980), but the amendments are not material to these proceedings. The two questions arising on the appeal turn on:-

(in pocket at end)

(in pocket at end)

(i) the construction and meaning of section 8(e) of the Act; and

(ii) the proper approach to be adopted and weight to be given under the Act to the respective contribution(s) of each spouse as specified in Sections 15 and 18 of the Act.

(There is a possibility that at the instance

of the Appellant a question will arise on the Appeal on the valuation of assets).

5. The Act is expressed to be "An Act to reform the law of matrimonial property: to recognise the equal contribution of husband and wife to the marriage partnership: to provide for a just division of the matrimonial property between the spouses when their marriage ends by separation or divorce ....".

6. The provisions of the Act, so far as material to the instant appeal and cross-appeal, are set out below.

7. "8. The Matrimonial Property defined - Matrimonial property shall consist of -

(a) The matrimonial home whenever acquired; and

(b) The family chattels whenever acquired; and

(c) All property owned jointly or in common in equal shares by the husband and the wife; and

(d) All property owned immediately before the marriage by either the husband or the wife if the property was acquired in contemplation of his or her marriage to the other and was intended for the common use and benefit of both the husband and the wife; and

(e) Subject to subsections (3) to (6) of section 9 and to section 10 of this Act, all property acquired by either the husband or the wife after the marriage, including property acquired for the common use and benefit of both the husband and the wife out of property owned by either the husband or the wife or both of them before the marriage or out of the proceeds of any disposition of any property so owned; and

(f) Any income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (e) of this section : ..."

8. "9. Separate property defined -

(1) Separate property means all property of either spouse which is not matrimonial property.

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(2) Subject to subsection (6) of this section and to section 8(e) and 10 of this Act, all property acquired out of separate property, and the proceeds of any disposition of separate property, shall be separate property.

(3) Subject to subsection (6) of this section, any increase in the value of separate property, and any income or gains derived from such property, shall be separate property unless the increase in value or the income or gains (as the case may be) were attributable wholly or in part -

(a) To actions of the other spouse, or

(b) To the application of matrimonial property, -

in either of which events the increase in value or the income or gains (as the case may be) shall be matrimonial property.

(4) All property acquired by either the husband or the wife while they are not living together as husband and wife shall be separate property unless the Court considers that it is just in the circumstances to treat such property or any part thereof as matrimonial property.

(5) Subject to section 21 of this Act, all property acquired by either the husband or the wife after an order of the Court has been made defining their respective interests in the matrimonial property, or dividing or providing for the division of that property, shall be separate property: ...

(6) Subject to section 10 of this Act, any separate property which is or any proceeds of any disposition of, or any increase in the value of, or any income or gains derived from, separate property, which are, with the express or implied consent of the spouse owning, receiving or entitled to them, used for the acquisition or improvement of, or to increase the value of, or the amount of any interest of either the husband or the wife in, any property referred to in section 8 of this Act shall be matrimonial property."

9. "10. Property acquired by succession or by survivorship or as a beneficiary under a trust or by gift.

(1) Property acquired by succession or by survivorship or as a beneficiary under a trust or by gift from a third person shall not be matrimonial property unless, with the express or implied consent of the spouse who received it, the property or the proceeds of any disposition of it have been so intermingled with other matrimonial property that it is unreasonable or impracticable to regard that property or those proceeds as being separate property.

(2) Property acquired by gift from the other spouse shall not be matrimonial property unless the gift is used for the benefit of both the husband and the wife.

(3) Notwithstanding subsections (1)and (2) of this section and section 9 (4) of this Act, both the matrimonial home and the family chattels shall be matrimonial property unless designated separate property by an agreement made in accordance with section 21 of this Act."

10. "11. Division of matrimonial home and family chattels -

(1) Subject to the provisions of this section, upon the division of the matrimonial property each spouse shall share equally in:

(a) The matrimonial home, and

(b) The family chattels ..."

11. "14. Extraordinary circumstances - Where there are extraordinary circumstances that, in the opinion of the Court, render repugnant to justice the equal sharing between the spouses of any property to which section 11 of this Act applies or of any sum of money pursuant to section 12 of this Act, the share of each shall, notwithstanding anything in section 11 or section 12 of this Act, be determined in accordance with the contribution of each to the marriage partnership."

12. "15. Division of balance of matrimonial property -

(1) Upon the division of matrimonial property (other than property to which section 11 or section 12 of this Act applies), each spouse shall share equally in it unless his or her contribution to the marriage partnership has clearly been greater than that of the other

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spouse.

(2) Where, pursuant to subsection (1) of this section, the spouses do not share equally in the matrimonial property or any part of the matrimonial property, the share of each in the matrimonial property or in that part of it shall be determined in accordance with the contribution of each to the marriage partnership ..."

13. "18. Contributions of spouses -

(1) For the purposes of this Act a contribution to the marriage partnership means all or any of the following:

(a) The care of any child of the marriage....

(b) The management of the household and the performance of household duties:

(c) The provision of money, including the earning of income, for the purposes of the marriage partnership:

(d) The acquisition or creation of matrimonial property, including the payment of money for those purposes:

(e) The payment of money to maintain or increase the value of -

(i) The matrimonial property or any part thereof; or .....

(f) The performance of work or services in respect of -

(i) The matrimonial property or any part thereof, or

(ii) The separate property of the other spouse or any part thereof:

(g) The foregoing of a higher standard of living than would otherwise have been available:

(h) The giving of assistance or support to the other spouse (whether or not of a material kind), including the giving of assistance or support which -

(i) .....

(ii) Aids the other spouse in the carrying on of his or her occupation or business.

(2) There shall be no presumption that a contribution of a monetary nature (whether under subsection (1)(c) of this section or otherwise) is of greater value than a contribution of a non-monetary nature.

(3) In determining the contribution of a spouse to the marriage partnership any misconduct of that spouse shall not be taken into account to diminish or detract from the positive contribution of that spouse unless the misconduct has been gross and palpable and has significantly affected the extent or value of the matrimonial property."

14. The first question for consideration is whether the words "... all property acquired by either the husband or the wife after the marriage" in section 8(3) of the Act are to be read as being subject to some further restriction beyond that imposed by the words, "subject to subsections (3) to (6) of section 9 and to section 10 of this Act," (and, if so, what restriction). In the context of the case the first question is whether the assets derived from the sale of the Appellant's shares in Reid Containers Limited (hereinafter "the shares") are matrimonial property in accordance with section 8(e) of the Act and therefore divisible in accordance with section 15 of the Act. Before Quilliam J. the Appellant contended that properties 14-23 (set out in the Judgment of Woodhouse J at p.576) having a then value of $76,809 were not matrimonial property. Both the trial Judge and the Court of Appeal held that these properties were matrimonial property, and it is not understood that the Appellant is appealing against these decisions.

15. The following material facts were proved or admitted in respect of the shares and the assets produced by the sale of the shares:-

(i) At the date of the marriage on 19th November 1955 neither party had assets of any consequence apart from some furniture and chattels owned by the Respondent.

(ii) Until September 1959 the Appellant was a salaried employee.

(iii) In September 1959 the Appellant left employment and set up a business. He rented a small factory building in Nelson Street,

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Petone. In 1960 he incorporated a company called Reid Containers Limited.

(iv) The issued share capital of this company was 1500 shares of $1 each. The Respondent acquired one share for cash. The Appellant acquired the balance of 1499 shares. The consideration for his shares was a gift of $1,000 from his mother and tools and equipment he sold to the company.

(v) The business was extremely successful, and when the Appellant sold it some 17 years later the shares realised approximately $500,000.

(vi) When sold, the shares were translated into other assets which, when combined with other property, were valued in total at $776,086.94.

Vol 1 P 140 LL 18-40 (1980) 2 NZLR at p 275

(vii) When divided in accordance with the orders appealed against (and taking into account the equal division of the matrimonial home and family chattels) the totality of the matrimonial assets would provide $450,450.16 (60% of the total) for the Appellant and $325,636.38 for the Respondent (40% of the total).

See (1980) 2 NZLR at p 275

(viii) Of the $325,636.38 due to the Respondent, she already held $94,967.42 leaving a balance due of $230,668.96. After taking account of taxation and an interim payment made at the time of separation, and accordingly allowing the Appellant an extra $50,000, the balance found to be due to the Respondent was $180,668.96 for which sum the Respondent received Judgment. The relevant adjustments arose because Quilliam J. added interest to the earlier values to bring them up to date.

(1980) 2 NZLR at p 274-5.

The Court of Appeal considered that, as 40% of the property was the Respondent's, the Respondent should allow the Appellant $20,000 of his $50,000 tax liability.

16. The trial at first instance was heard on 22nd and 23rd September, 1977. Reasons for Judgment and Judgment, were pronounced by Quilliam J. on 21st November 1977. He found that though the shares were acquired by the Appellant after the marriage, section 8(e) must in some way be limited. He held that Section 8(e) applied only to property acquired for common use and benefit, and that therefore the shares should be excluded from a calculation of the respective interests of the parties.

17. In the Court of Appeal of New Zealand, the Court on 22nd August 1979 unanimously gave an unrestricted meaning to section 8(e) holding:- Record

Per Woodhouse J.

(i) that the purpose of the second part of section 8(e) was not to enlarge but to clarify the first part;

(ii) the second part was not redundant; and

(iii) the clear words of the section were consistent with the purpose of the Act.

Per Cooke J.

(i) the words of Section 8(e) were clear and were not subject to section 9(2): the contrary was the case; and

(ii) the second part was clarificatory not superfluous.

Per Richardson J.

(i) the words of section 8(e) were clear; the origin of funds was irrelevant; and

(ii) the words were not inconsistent with the scheme of that part of the Act which the learned Judge analysed.

18. It is respectfully submitted that the considerations set out by the Court of Appeal of New Zealand correctly led them to determine that assets derived from the business were matrimonial property within the meaning of the Act. Woodhouse J. (1979) 1NZLR 580 LL 9-15.

19. The second question for consideration relates to the extent to which, if at all, the majority decision of the Court of Appeal of New Zealand fixing the respective shares in the matrimonial property other than the matrimonial home and family chattels (namely the proceeds of sale of the shares and the properties 14-23) at 60% to the Appellant and 40% to the Respondent should be varied. Woodhouse J. and Richardson J. held that the respective shares were 60% to the Appellant, 40% to the Respondent. In his judgment, Cook J. who dissented from the majority on this point only held the respective shares should have been 75% to the Appellant, 25% to the Respondent.

20. The following material facts were proved or admitted in respect of the contributions that each

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spouse had made to the marriage partnership:-

(i) Generally. The parties were married on 19th November 1955. The Appellant was born in New Zealand, and the Respondent in London. The Appellant was born on 25th March 1925 and is now 56. The Respondent was born on 9th March 1930 and is now 51.

Section 18(1)(a).

(ii) There were four children of the family.

Philip Michael, born 3rd September 1956 (25)

Matthew Stuart, born 22nd January 1958 (23)

Timothy James, born 1st January 1961 (20)

Carolyn Ruth, born 18th August 1964 (17).

(iii) The Respondent bore and cared for each of these children. Contrary to the Appellant's contentions, Quilliam J found the Respondent's contributions must have been appreciably greater than the Appellant's. The judgment of Woodhouse J. was to the effect, "not a word of complaint has been or could be made about the domestic achievement of the wife...".

Section 18(1)(b).

(iv) The Respondent managed the household and undertook the domestic duties. It was conceded by the Appellant that the Respondent's contribution was the major contribution in this regard. She was accepted to be a prudent housewife who, for example, gave the Appellant lunch at home nearly every day.

Section 18(1)(c) & (d).

(v) The parties each provided money.

Capital

The provision of capital was held by the trial judge to be almost entirely that of the Appellant though he found the Respondent provided chattels and other items totalling $15,000. Woodhouse J found and described the Respondent's contributions as her own major contributions viz:

(a) $4,000 (subsequently repaid by the Appellant). Record

(b) $4,004. The date of this payment was not given in the Affidavit but can be assumed to be 1963. (1979) 1 NZLR 576, 586-589

(c) $784 in 1961 together with the provision of chattels worth $10,526. Both Woodhouse J. and Cooke J. found the Respondent contributed $5,000 to the purchase of a property at 85 Nelson Street, Petone. The bulk of the capital came from the sale of the shares which in turn was principally but not wholly attributable to the Appellant's impressive inventive and commercial ability.

Income

The Respondent was qualified as physiotherapist, but did not work outside the family during the marriage. Her evidence (in separation proceedings on 16th December 1976) was that the Appellant had never wanted her to work. The evidence in the instant proceedings was that when Reid Containers Limited was incorporated, the Respondent agreed to do the wages, and she did so for some years. The Repondent's English property provided a "modest private income". The Appellant's income was partly ploughed back into the business and partly supported the family.

Section 18(1)(g).

(vi) By reason of the Respondent's frugal housekeeping the Appellant was able to plough back money into the business. 1979 1 NZLR p 589LL 13 and 14

Section 18(1)(h).

(vii) Quilliam J. found there was additional assistance given by the Respondent (beyond what Quilliam J. had already considered) and that some allowance should be made for that fact.

Section 18(1)(h)(ii). 1979 1NZLR 589 LL 17-23

(viii) The Respondent actively supported the Appellant in his business interests. Vol. 1 Part 1 P.55, lines 25-48)

21. The Court of Appeal of New Zealand held:

per Woodhouse J. (majority judgment)

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(i) He considered section 15 of the Act posed two questions, effectively "What is the meaning of "the contribution of each to the marriage partnership"? and "On what basis is a decision to be made that the contribution was or was not clearly greater?"

1979 1NZLR P 580/18-30

(ii) He identified five preliminary considerations viz:-

(a) the scheme of the Act followed the recognition in New Zealand of the equal contribution of husband and wife to the marriage partnership;

(b) there was a strong bias in favour of equality;

P 581/11

(c) the Act was aimed at clarity and certainty;

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(d) money had previously been regarded as too important and was not to assume too great a weight. (See section 18(2) of the Act);

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(e) the common acceptance of risks was a strong factor predisposing to common sharing.

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(iii) He confirmed that the Act required a consideration of section 18 contributions to the marriage partnership, not of contributions to property. After considering Haldane v Haldane 1977 AC 673, he passed to section 15(1) of the Act, Barton v Barton 1979 INZLR 130, and the need to give practical effect to "clearly". Having dealt with the contributions of the parties in the instant case, he concluded there was clear disparity. He went on to assess the respective shares at 60%/40%

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591/15-17
592/1-4

per Cooke J (dissenting judgment)

593/52 (iv) He considered the dispute centred largely around the shares. In the resolution of the issues the general approach to the Act was a relevant consideration. He referred to three points to be derived from recent authority viz:-

(a) Though the Act moved close to a formal regime of community property, it stopped short of the full distance.

(b) The starting point was the natural and ordinary meaning of the Act. Record 594/37-55

(c) The Act contained both statements of intention and elements of discretion.

(v) After reviewing the ingredients of section 18 he attached importance to the absence of a definition of "the marriage partnership", to the totality of contributions and, while recognising the difficulty of weighing them, he concluded that the words of section 15(1) in their ordinary meaning meant that before equal sharing was discarded, it had to be clear that one spouse's contribution was greater. He concluded that if that could be shown, subject to the de minimis rule, equality would be displaced. After considering authority and an academic discussion, he reviewed and assessed the facts of the case. He concluded that the contribution of the shares had to alter the balance. He said at page 603, line 41, "The effect of the injection of a large money or property contribution into the equation must vary with the facts of each case. Here, if only the contributions compared by the Judge are taken into account, it would be possible, contrary to his conclusion, to find that the hushand had not discharged the onus of showing that his total contribution had clearly been greater. It could be seen as a fairly typical case of some predominance of non-monetary contribution by the wife, some predominance of monetary contributions by the husband, and each playing his or her part in the partnership reasonably fully - with resultant equality. Assets of about $200,000 at present day values would then be divided equally. But the $500,000 contribution, the whole of it intact, must alter the balance ....." He thought the Court should try to act much as would an informed jury sympathetic to the general intention of Parliament, and assessed the respective shares at 75% to the Appellant and 25% to the Respondent.

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605/5-10

per Richardson J (majority judgment)

(vi) He considered the assessments of contribution depended on the application of section 15 and section 18 and required a two step enquiry, i.e. whether there had been clear disparity and if so the assessment of the contributions. As to evaluation,

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609/25

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609/42 statutory concern was directed to the contribution each had made to the marriage partnership while living together as husband and wife.

(vii) He noted that there was no express means of evaluating kinds of contribution, and no
610/51 conclusion that monetary contributions were of greater value than non-monetary contributions. Division according to contributions emphasised the fact that matrimonial property was the property of the
611/30 partnership. He concluded caution was needed before concluding one spouse's contribution was greater than the other's. He went on to express general agreement with the assessment of Woodhouse J. and to justify a
612/11 differentiation in contribution in terms of
612/15-20 the Appellant's inventive skills and commercial expertise. Weighing up these
612/42 factors he concluded the respective shares were 60%/40%.

22. In the light of the facts set out in Paragraph 20 above and the terms of the Statute appearing in paragraphs 12 and 13 above, the appropriate Order was that sought by way of cross-appeal on the part of the Respondent.

23. The Respondent submits that as to the first question the appeal should be dismissed with costs for the following amongst other

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(1) BECAUSE as the Court of Appeal of New Zealand rightly held on its true construction section 8(e) of the Act is not limited in meaning or effect by anything other than section 9(3) - 9(6) and section 10 of the Act.

(2) BECAUSE the judgments of the Court of Appeal of New Zealand on this issue were correct.

24. The Respondent submits that as to the second question the appeal should be dismissed with costs and that the cross-appeal should be allowed for the following amongst other

R E A S O N S

(3) BECAUSE on the facts as found and admitted, it was not shown by the Appellant that his contribution to the marriage partnership was clearly greater than that of the Respondent

within the meaning of section 15(1) of the Act, nor was there any sufficient material to increase or reduce the respective half shares of the parties.

(4) BECAUSE the Court of Appeal of New Zealand neglected to give sufficient weight to the principles set out in section 18 of the Act.

(5) THAT even if it was established that the respective half shares should be altered, the alterations should not be more than 60% to the Appellant and not less than 40% to the Respondent, for the reasons set out in the majority Judgments of Woodhouse J. and Richardson J. in the Court of Appeal of New Zealand and in the light of the contributions referred to at Paragraph 20 above.

Signed:

J.R.B. FOX-ANDREWS

ANTHONY TEMPLE

No. 27 of 1981

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

ANTHONY FULTON REID — Appellant

- and -

SUSAN ROSEMARY REID — Respondent

CASE FOR THE RESPONDENT

Blyth Dutton Holloway,
9 Lincoln's Inn Fields,
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Ref. ACI

Agents for the Respondent